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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 JOSE BUENROSTRO,

11 Defendant.
12

Case No.: 2:17-cr-00267-APG-GWF

FINDINGS AND RECOMMENDATION

Re: Motion to Suppress (ECF No. 45)

13
14 This matter is before the Court on Defendant's Motion to Suppress Physical Evidence
15 (ECF No. 45), filed on March 1, 2019. The Government filed its Response (ECF No. 57) on
16 April 24, 2019, and Defendant filed his Reply (ECF No. 58) on May 1, 2019. The Court
17 conducted an evidentiary hearing on May 29, 2019, during which Nevada Probation Officers
18 Andrew Thompson, Andrew Wintersteen, and Christine MacDermaid, and former DEA Special
19 Agent Sean Mabey testified.

20 **BACKGROUND**

21 Defendant Jose Buenrostro is charged in a two count indictment filed on August 16, 2017
22 with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and
23 924(a)(2); and possession of a controlled substance with intent to distribute in violation of 21
24 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(viii). *Indictment* (ECF No. 1). These charges arise out of
25 the discovery of illegal controlled substances and firearms in Defendant's residence during a
26 search conducted by officers of the Nevada Division of Parole and Probation on June 20, 2017.

1 Defendant argues that the search violated his rights under the Fourth Amendment and the
2 evidence should be suppressed.

3 On October 29, 2014, Mr. Buenrostro was convicted in the Superior Court of Arizona,
4 Yavapai County, of “Possession of Marijuana (Four Pounds or More),” a Class 4 felony. His
5 sentence was suspended and he was placed on supervised probation for a period of forty months.
6 *Government Hearing Exhibit 1*, at 004. Mr. Buenrostro applied to have his probation transferred
7 to the State of Nevada where he intended to reside. On October 29, 2014, Mr. Buenrostro signed
8 an “Offender’s Application for Interstate Transfer,” on a form adopted by the Interstate
9 Commission for Adult Offender Supervision. *Id.* at 012. The application form stated in
10 pertinent part:

11 2. I will comply with the terms and conditions of my supervision that have
12 been placed on me, or that will be placed on me by Arizona (sending state) and
13 Nevada (receiving state)

14 3. I understand that if I do not comply with all terms and conditions that the
15 sending state or the receiving state, or both, placed on me, that it will be
16 considered a violation and I may be returned to the sending state.

17 *Id.*

18 On October 29, 2014, Mr. Buenrostro also signed the Arizona Uniform Conditions of
19 Supervised Probation which stated in pertinent part:

20 4. I will submit to search and seizure of person and property by the APD
21 without a search warrant.

22 . . .

23 7. I will provide APD safe, unrestricted access to my residence and receive
24 prior approval of the APD before changing my residence. I will reside in a
25 residence approved by the APD.

26 *Id.* at 001-003.

27 On January 21, 2015, Mr. Buenrostro signed the “Nevada Interstate Probation
28 Agreement and Rules” form which included the following standard condition:

1 6. **Search:** You shall submit your person, property, place of residence,
2 vehicle or areas under your control to search, including electronic surveillance
3 or monitoring of your location at any time, with or without a search warrant or
4 warrant of arrest, for evidence of a crime or violation of probation by the
5 Division of Parole and Probation or its agent.

6 Under “**Special Conditions**,” the agreement also provided:

7 **1. Warrantless search of person, residence and/or property under**
8 **subject’s control[.]**

9 *Id.* at 013.

10 Mr. Buenrostro’s application was granted and his probation supervision was assigned to
11 Probation Officer Andrew Thompson. Officer Thompson testified that he is an interstate
12 compact officer. His duties include completing paperwork on probationers who transfer to or
13 from Nevada. He also supervises approximately one hundred probationers. Officer Thompson
14 handled Mr. Buenrostro’s transfer application and reviewed the conditions of probation with him
15 at the outset of his probation in Nevada. He prepared an initial assessment of Mr. Buenrostro on
16 February 3, 2015, and placed him on “medium level” supervision. *Government Hearing Exhibit*
17 2, at 263. He visited Mr. Buenrostro’s residence approximately every five or six months.
18 During those visits he conducted “walk-through” searches of the house, looking for any
19 indication that Mr. Buenrostro was violating his probation conditions or engaging in illegal
20 activity. During the walk-throughs, he would occasionally touch or move things, such as
21 clothing in a closet. Officer Thompson understood that Mr. Buenrostro worked as an automobile
22 mechanic and was paid “under the table.” His wife worked a full time job. Officer Thompson
23 viewed Mr. Buenrostro’s employment situation as a minor violation of his probation conditions
24 which require legal employment. On April 5, 2016, Officer Thompson performed a
25 reassessment of Mr. Buenrostro’s supervision and placed him on “minimum level” supervision.
26 *Id.* at 254.

27 Mr. Buenrostro’s supervision was transferred to Officer Andrew Wintersteen on May 3,
28 2016 due to officer caseload adjustments. *Government Hearing Exhibit 2*, at 253. On July 13,
29 2016, Officer Wintersteen received a voicemail message from a DEA agent regarding Mr.
30 Buenrostro. Officer Wintersteen made telephone contact with DEA Agent Sean Mabey on July

1 27, 2016. According to Officer Wintergreen's note, Agent Mabey stated that he had received
2 notification from the Las Vegas Metropolitan Police Department that Mr. Buenrostro was
3 involved in a heroin smuggling ring, and was transporting heroin from Phoenix, Arizona to Las
4 Vegas, Nevada. Mr. Buenrostro's cousin took the heroin sales proceeds to Mexico. Agent
5 Mabey stated that he would get back in touch with Officer Wintersteen in August to provide a
6 status on the investigation. *Id.* at 250. Officer Wintersteen testified that he took no action in
7 response to this information because he did not want to "interrupt" the DEA investigation. He
8 believed he would have informed his supervisor about this information, but did not enter a
9 Chrono note to that effect.

10 On August, 5, September 7, and October 7, 2016, Mr. Buenrostro reported to Officer
11 Wintersteen that he was a self-employed automobile mechanic and was paid in cash. He also
12 provided a bank statement as verification of his employment. *Government Hearing Exhibit 2*, at
13 246, 248, and 249. During a home visit on October 13, 2016, Officer Wintersteen observed Mr.
14 Buenrostro and a friend working on vehicles in the garage and observed that vehicle parts were
15 everywhere. He also conducted a "cursory search" of the residence. Officer Wintergreen
16 defined a cursory search as a "walk around" of the residence, during which he looks for
17 violations in plain view, and observes the demeanor and behavior of the residents. He does not
18 conduct a cursory search unless the probationer is present. Officer Wintersteen informed Mr.
19 Buenrostro on October 13, 2016 that his supervision was being transferred back to Officer
20 Thompson. *Id.* at 246. He believed he would have informed Officer Thompson about the
21 information he received from DEA Agent Mabey in July 2016, but did not have a specific
22 recollection of doing so.

23 Officer Thompson testified that Officer Wintersteen informed him about the information
24 provided by DEA Agent Mabey when he reassumed Mr. Buenrostro's supervision. On
25 November 30, 2016, Officer Thompson completed a reassessment of Mr. Buenrostro and placed
26 him "in minimum supervision as no issues had [arisen] thus far." *Id.* at 245. He noted in March
27 and April 2017 that Mr. Buenrostro was working at a sandwich shop. *Id.* at 242.

1 On May 9, 2017, Officer Thompson received a voicemail message from Agent Mabey
2 which stated that Mr. Buenrostro was continuing to sell heroin. Officer Thompson called Agent
3 Mabey back and left a return message. *Id.* at 241. He did not recall whether he actually spoke to
4 Agent Mabey. Officer Thompson was aware that Mr. Buenrostro had been given permission to
5 travel to Arizona in March 2016, and at the end of April/beginning of May 2017. *See also*
6 *Government Hearing Exhibit 3* (travel authorizations). After receiving the voicemail message
7 from Agent Mabey, Officer Thompson told his sergeant that Mr. Buenrostro might need a closer
8 level of supervision. This would involve assigning him to a “risk assessment” officer who had a
9 lower caseload and could perform more in-depth investigations. On May 25, 2017, Officer
10 Thompson conducted a home visit, during which he met with Mr. Buenrostro and reviewed the
11 conditions of supervision. He did not inform Defendant that he was being assigned to a new
12 probation officer. *Government Hearing Exhibit 2*, at 240.

13 On May 25, 2017, Probation Officer Christine MacDermaid spoke with Mr. Buenrostro
14 by telephone and informed him that she was his new probation officer. She instructed him to
15 report to the probation office on June 5, 2017. During this conversation, Mr. Buenrostro stated
16 that he worked as an independent contractor. *Id.* at 240. On May 30, 2017, Probation Officers
17 MacDermaid and Hillyer conducted a visit at Mr. Buenrostro’s residence. They observed Mr.
18 Buenrostro and another male working on an automobile. The other individual provided
19 identification, and after Officer MacDermaid determined that he had no warrants, wants or
20 felony record, he was allowed to leave. Officer MacDermaid’s note states that the officers
21 conducted a “[c]ursory search” of the residence during which Officer MacDermaid “noted a
22 large folded stack of 100 \$ bills in the top right dresser drawer [that] was partially opened and
23 just thrown in there.” She also “noted a folded stack of 20 \$ bills folded in the top nightstand
24 drawer sticking out.” The note indicates that Officer MacDermaid forwarded this information to
25 DEA Agent Mabey. *Id.* at 240.

26 Agent MacDermaid met with Mr. Buenrostro on June 5, 2017. She noted that he did not
27 provide proof of employment, and had not completed a “10-99” form. Mr. Buenrostro stated that
28 he was a self-employed mechanic. He paid \$120.00 on his probation fees that day. He reported

1 that he owned three automobiles, a 1988 Ford Mustang, a 2006 Dodge Durango, and a 2004
2 Nissan Titan. *Id. at 239.*

3 On June 20, 2017, Officer MacDermaid and other probation officers conducted the search
4 of Mr. Buenrostro's residence during which they discovered firearms, methamphetamine, and
5 marijuana. The officers contacted Las Vegas Metropolitan Police Officers who obtained a
6 telephone search warrant to further search the residence. After being advised of his *Miranda*
7 rights, Mr. Buenrostro allegedly admitted to the police that the firearms and illegal drugs found
8 in the residence belonged to him. *Id. at 239.*

9 Former DEA Special Agent Sean Mabey testified that he began an investigation of Mr.
10 Buenrostro in May of 2016 after he received a telephone call from a former DEA confidential
11 source of information who stated that Mr. Buenrostro was involved in narcotics trafficking.
12 Agent Mabey had not previously dealt with this confidential source who was located in Mexico.
13 He reviewed the DEA file on the confidential source and spoke with other DEA agents who had
14 worked with him.¹ The information indicated that the confidential source had provided reliable
15 information in two prior cases that resulted in the seizure of drugs and successful prosecution.
16 There was no derogatory information about the confidential source in the file, and the other DEA
17 agents vouched for him. Agent Mabey did not know if the confidential source had a criminal
18 record. He believed that he had been paid for information, but did not know if he provided
19 information in exchange for favorable treatment on criminal charges.

20 The confidential source told Agent Mabey that an individual named Jose was involved in
21 trafficking heroin, methamphetamine and cocaine from Phoenix to Las Vegas; and that Jose's
22 cousin, whose last name was Ortiz, took the sales proceeds to Mexico. The confidential source
23 stated that he had purchased crystal methamphetamine from Jose at his Las Vegas automobile
24 repair shop in 2013 and he provided Jose's telephone number. Agent Mabey determined through
25 subpoenas that the Mr. Buenrostro was the subscriber for that telephone number. He sent a
26 photograph of Mr. Buenrostro by text message to the confidential source who confirmed that it

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28 ¹ Agent Mabey did not state whether the confidential source was male or female. The male designation is
used solely for ease of reference.

1 was Jose. The confidential source stated that Jose was “under house arrest for a prior offense.”
2 Agent Mabey ran a criminal records check on Mr. Buenrostro through NCIS and other law
3 enforcement data bases, and determined that he was on probation with the State of Nevada. He
4 then reached out to Nevada Parole and Probation to advise that he had information that Mr.
5 Buenrostro was involved in drug trafficking.

6 The confidential source later reported to Agent Mabey that he spoke to Mr. Buenrostro in
7 September 2016 about purchasing crystal methamphetamine. Mr. Buenrostro told the
8 confidential source that he was not able to sell crystal methamphetamine at that time, and
9 indicated that he was waiting on “powder.” A state court pen register and trap and trace order
10 was obtained on Mr. Buenrostro’s telephone number. It did not produce any additional
11 information that Mr. Buenrostro was engaged in illegal activity.

12 Agent Mabey closed the investigation of Mr. Buenrostro in February 2017 because he
13 had lost contact with the confidential source and had not developed other evidence of criminal
14 activity by Mr. Buenrostro. Approximately three months later, Agent Mabey received a
15 telephone call from the confidential source who stated that Mr. Buenrostro was still engaged in
16 narcotics trafficking. Agent Mabey stated that this conversation was brief and that he was
17 surprised to receive the call. Agent Mabey spoke to Nevada Parole and Probation Officer
18 MacDermaid and informed her that he had received information that Mr. Buenrostro was still
19 involved in illegal activity. Officer MacDermaid subsequently called him on June 20, 2017
20 about the search of Mr. Buenrostro’s residence. Agent Mabey went to the residence, but was not
21 involved in the investigation.

22 Officer MacDermaid testified that she is assigned to an intensive supervision unit that
23 supervises probationers or parolees who have an extensive criminal history, violent offenses,
24 gang ties, or otherwise require more supervision. Supervision of Mr. Buenrostro was transferred
25 to her on May 25, 2017 after Parole and Probation received information from Agent Mabey that
26 Mr. Buenrostro was involved in narcotics trafficking. Officer MacDermaid telephoned Mr.
27 Buenrostro and informed him that she was now his probation officer. She reviewed Mr.
28 Buenrostro’s file and the Chrono notes in the file. Officer MacDermaid stated that tip

1 information that Mr. Buenrostro was engaged in narcotics trafficking, and his underlying
2 conviction for trafficking a large quantity of drugs, was of concern to her. On cross-
3 examination, Agent MacDermaid acknowledged that Defendant's conviction was for possession
4 of marijuana, not drug trafficking. She also noted that Mr. Buenrostro stated that he was a self-
5 employed mechanic, but there was no verification of his employment or how he was bringing
6 money into the household. He had a house and owned several cars which, in her opinion, did not
7 correspond with the lack of verified employment. (Mr. Buenrostro's wife was employed full
8 time.) Mr. Buenrostro did not have a business license or a 1099 form. He reported that he
9 worked for cash and did not pay taxes. Officer MacDermaid believed that Mr. Buenrostro's
10 previous probation officers should not have overlooked the unlawful status of his employment.

11 Officer MacDermaid testified that she spoke directly to Agent Mabey who told her that
12 an informant in Mexico reported that Mr. Buenrostro was bringing large amounts of heroin
13 across state lines. She had also reviewed Officer Wintersteen's notes regarding the earlier
14 information received from Agent Mabey. She believed that Mr. Buenrostro's travel passes to
15 Arizona corresponded to the tip information. During the walk-through inspection on May 30,
16 2017, she observed a large amount of money in a bedroom dresser drawer and in a nightstand
17 drawer that were partially opened. She believed that the presence of the money was consistent
18 with the information that Mr. Buenrostro was engaged in heroin smuggling. Her follow-up
19 meeting with Mr. Buenrostro on June 5, 2017 supported her suspicion that he was engaged in
20 illegal activity because he stated that he was not reporting his income from working as a
21 mechanic to the IRS. He also made a large payment on his supervision fees that day which she
22 found suspicious. She also found it suspicious that Mr. Buenrostro owned three automobiles that
23 she believed were insured.

24 Agent MacDermaid testified that she decided to conduct the probation search on June 20,
25 2017 based on the following information: (1) the tips from DEA Agent Mabey; (2) the large
26 amount of money observed in Mr. Buenrostro's residence on May 30, 2017; (3) Mr.
27 Buenrostro's inability to demonstrate lawful employment; and (4) being behind on his
28 supervision fees. During the search by the probation officers on June 20th, a firearm was

1 discovered in a spare bedroom. Once the firearm was discovered the officers placed Mr.
2 Buenrostro in handcuffs and read him his *Miranda* rights. Agent MacDermaid then contacted
3 Agent Mabey and notified him that she needed assistance to search the residence. She also
4 contacted the Las Vegas Metropolitan Police Department (LVMPD) for assistance. LVMPD
5 officers responded to the scene. The other probation officers continued to search and found
6 methamphetamine and an additional firearm in the residence. Large quantities of cash were also
7 found in the same locations where Officer MacDermaid had observed cash during the walk-
8 through on May 30, 2017.

9 DISCUSSION

10 The testimony of Officers Thompson, Wintersteen, MacDermaid, and Agent Mabey was
11 generally credible in regard to the factual information they conveyed. Some doubt is raised by
12 Officer MacDermaid's and Agent Mabey's failure to document in writing the conversation that
13 they had in May 2017 regarding the information provided by the confidential source. Agent
14 Mabey also failed to document the telephone call he received from the confidential source at
15 about that time. Officer Thompson, however, documented the voicemail message that Agent
16 Mabey left with him on May 9, 2017 that the Defendant was continuing to sell drugs. The Court
17 accepts the testimony that Agent Mabey spoke to the confidential source in or about early May
18 2017 and that he communicated this information to Officer MacDermaid prior to May 30, 2017.

19 The Fourth Amendment states that the "[t]he right of the people to be secure in their
20 persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be
21 violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,
22 and particularly describing the place to be searched, and the persons or things to be seized." "A
23 probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that
24 searches be 'reasonable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168 (1987).
25 Although a warrant supported by probable cause is usually required by the Fourth Amendment,
26 "exceptions to these requirements have been permitted when 'special needs, beyond the normal
27 need for law enforcement, make the warrant, and probable-cause requirement impractical.'" *Id.*
28 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 748 (1985)). The Court held

1 that a state probation system presents “special needs” that may justify departures from the usual
2 warrant and probable-cause requirements. *Id.*, 483 U.S. at 873-74, 107 S.Ct. at 3168.
3 Probationers “do not enjoy ‘the absolute liberty to which every citizen is entitled, but only . . .
4 conditional liberty properly dependent on observance of special [probation] restrictions.’” *Id.*,
5 483 U.S. at 874, 107 S.Ct. at 3169. Probation restrictions are meant to assure that the probation
6 serves as a period of genuine rehabilitation and that the community is not harmed by the
7 probationer being at large. *Id.*, 483 U.S. at 875, 107 S.Ct. at 3169.

8 In *Griffin*, the probation office received a tip from a police detective that there were, or
9 might be, firearms in the probationer’s residence. *Id.*, 483 U.S. at 871, 107 S.Ct. at 3167. A
10 state regulation permitted a probationer’s home to be searched without a warrant so long as there
11 were reasonable grounds to believe that contraband, including items that the probationer was not
12 allowed to possess, were located in the residence. Acting on the police tip, the probation officers
13 searched Griffin’s residence and found a handgun. The Wisconsin Supreme Court held that the
14 tip constituted reasonable grounds for the search pursuant to the regulation. *Id.*, 483 U.S. at 874,
15 107 S.Ct. at 3169. The Supreme Court held that the special needs of Wisconsin’s probation
16 system made the warrant requirement impractical and justified replacing the requirement for
17 probable cause with reasonable grounds as defined by the Wisconsin Supreme Court. *Id.*, 483
18 U.S. at 875-76, 107 S.Ct. at 3169-70. In holding that the search of Griffin’s home did not violate
19 the Fourth Amendment, the Court stated:

20 In such circumstances it is both unrealistic and destructive of the whole object
21 of the continuing probation relationship to insist upon the same degree of
22 demonstrable reliability of particular items of supporting data, and upon the
23 same degree of certainty of violation, as is required in other contexts. In some
24 cases—especially those involving drugs or illegal weapons—the probation
25 agency must be able to act based upon a lesser degree of certainty than the
26 Fourth Amendment would otherwise require in order to intervene before a
probationer does damage to himself or society. The agency, moreover, must be
able to proceed on the basis of its entire experience with the probationer, and to
assess probabilities in the light of its knowledge of his life, character, and
circumstances.

27 To allow adequate play for such factors, we think it reasonable to permit
28 information provided by a police officer, whether or not on the basis of
firsthand knowledge, to support a probationer search. The same conclusion is

1 suggested by the fact that the police may be unwilling to disclose their
 2 confidential sources to probation personnel. For the same reason, and also
 3 because it is the very assumption of the institution of probation that the
 4 probationer is in need of rehabilitation and is more likely than the ordinary
 citizen to violate the law, we think it enough if the information provided
 indicates, as it did here, only the likelihood (“had or might have guns”) of facts
 justifying the search.

5 The search of Griffin's residence was “reasonable” within the meaning of the
 6 Fourth Amendment because it was conducted pursuant to a valid regulation
 governing probationers. This conclusion makes it unnecessary to consider
 7 whether, as the court below held and the State urges, *any* search of a
 probationer's home by a probation officer is lawful when there are “reasonable
 8 grounds” to believe contraband is present.

9 *Id.*, 483 U.S. at 879-80, 107 S.Ct. at 3170-71.

10 In *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587 (2001), the Court held that a
 11 search pursuant to a probation search condition may be conducted for the purpose of obtaining
 12 evidence of criminal activity, rather than solely for purposes of probation supervision. In
 13 describing the purposes of probation, the Court stated that “[o]n the one hand is the hope that
 14 [the probationer] will successfully complete probation and be integrated back into the
 15 community. On the other is the concern, quite justified, that he will be more likely to engage in
 16 criminal conduct than an ordinary member of the community.” *Id.*, 534 U.S. at 120-21, 122
 17 S.Ct. at 592. Therefore, “when an officer has reasonable suspicion that a probationer subject to a
 18 search condition is engaged in criminal activity, there is enough likelihood that criminal activity
 19 is occurring that an intrusion on the probationer’s significantly diminished privacy interest is
 20 reasonable.” *Id.*, 534 U.S. at 121, 122 S.Ct. at 593.

21 Reasonable suspicion to conduct a probation search exists when the officer is aware of
 22 specific, articulable facts which, when considered with objective and reasonable inferences, form
 23 a basis for particularized suspicion. *United States v. Manansingh*, 281 F.Supp.3d 1096, 1099 (D.
 24 Nev. 2017) (citing *United States v. Evans*, 786 F.3d 779, 788 (9th Cir. 2015)). The standard for
 25 determining whether there is reasonable suspicion is an objective one. It does not turn on the
 26 subjective thoughts of the probation officer *Id.* at 1100 (citing *United States v. Magallon-Lopez*,
 27 817 F.3d 671, 675 (9th Cir. 2016)). However, the facts justifying the search must be known to
 28 officers at the time of the search. *Id.*

1 In *Himmage v. State*, 88 Nev. 296, 496 P.2d 763 (1972), the parole officer received a tip
2 from the police that defendant had stolen property in his apartment. The parole officer and
3 police officers searched defendant's residence and found the stolen property. In upholding the
4 search, the court relied on *People v. Mason*, 5 Cal.3d 759, 97 Cal.Rptr. 302, 488 P.2d 630 (Cal.
5 1971), *cert. denied* 405 U.S. 1016, 92 S.Ct. 1289 (1972), which involved almost identical facts,
6 except that the defendant was on probation. *Mason* stated that a "probationer who has been
7 granted the privilege of probation on condition that he submit at any time to a warrantless search
8 may have no reasonable expectation of traditional Fourth Amendment protection." The Nevada
9 Court approved the reasoning in *Mason*, and held that the search of defendant's residence
10 pursuant to the provision in his parole agreement did not violate the Fourth Amendment.
11 *Himmage*, 496 P.2d at 765-66.

12 In *Seim v. State*, 95 Nev. 89, 590 P.2d 1152, 1154 (1979), the court upheld the search of
13 the probationer's storage unit based on an informant's tip that stolen vehicles were located there.
14 The court noted that Nevada Revised Statue (NRS) 213.1096 empowers parole and probation
15 officers to "keep informed concerning the conduct and condition of all persons under their
16 supervision and use all suitable methods to aid and encourage them . . . to bring about
17 improvement in their conduct and conditions." 590 P.2d at 1154. The court stated that "[i]n
18 Nevada, as elsewhere, probation officers have long enjoyed extensive powers to search
19 probationers under their supervision." *Id.* (citations omitted). "To justify a warrantless search
20 by a parole or probation officer, the officer must have reasonable grounds to believe that a
21 violation of the parole or probation has occurred." *Id.* at 1154-55.

22 In *Samson v. California*, 547 U.S. 843, 850, 857, 126 S.Ct. 2193 (2006), the Supreme
23 Court held that the search of a parolee's person pursuant to a state law that authorized searches
24 of parolees without a search warrant and without reasonable cause did not violate the Fourth
25 Amendment. The Court noted that parolees have a lesser expectation of privacy than do
26 probationers. In *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013), the court held that a
27 suspicionless search conducted pursuant to a suspicionless-search condition in a violent felon's
28 probation agreement did not violate the Fourth Amendment. The Court did not reach the issue of

1 whether the Fourth Amendment permits the suspicionless search of a probationer who has not
2 accepted a suspicionless search condition, or of lower level offenders who have accepted a
3 suspicionless-search conditions. *Id.* The dissent argued that the search condition did not
4 explicitly state that a search could be conducted without reasonable suspicion (it only stated that
5 probable cause was not required), and therefore the evidence should have been suppressed. In
6 *United States v. Gomez*, 2014 WL 1089288 (N.D.Cal. March 14, 2014), the court held that the
7 probationer could not be subjected to a suspicionless search because the search provision in his
8 conditions of probation did not include suspicionless-search language, and the probationer was
9 not a violent felon. *Id.* at *14. *See also United States v. Craft*, 2017 WL 4948998, at *2
10 (N.D.Cal. Nov. 1, 2017) (holding that reasonable suspicion is required if the search provision
11 does not expressly authorize a suspicionless search).

12 In this case, the search conditions imposed on Defendant Buenrostro by the Arizona
13 Superior Court and by the State of Nevada pursuant to the Interstate Compact Transfer did not
14 expressly state that he was subject to a suspicionless search of his person, residence or vehicles.
15 Defendant was on probation for a felony conviction for possession of four pounds of marijuana
16 or more. Although his prior criminal record listed arrests for murder and domestic abuse, there
17 was no evidence that Defendant was ever convicted of a violent felony. *See Government*
18 *Hearing Exhibit 10*. The Nevada Supreme Court's decision in *Seim* states that the Nevada
19 probation officers must have reasonable suspicion to search a probationer's person, residence or
20 other property. In accordance with *Knights*, *King* and *Gomez*, the Court concludes that under the
21 Fourth Amendment, reasonable suspicion was also required to search Defendant's residence for
22 evidence that he violated his probation conditions or had engaged in criminal activity.

23 Courts have held that probation officers may conduct a home visit and walk-through
24 inspection of a probationer's residence without reasonable suspicion that the probationer has
25 violated his probation conditions or engaged in criminal activity. In *United States v. LeBlanc*,
26 490 F.3d 361 (5th Cir. 2007), the probation officer conducted a walk-through inspection of
27 defendant's residence during which he observed the barrel of a shotgun protruding from
28 underneath defendant's bed. The court stated:

While this Circuit has not yet considered the question, other Circuits in similar cases have held that a probation officer properly conducting an authorized home visit was not bound by the reasonable suspicion standard. The Second Circuit has held that “because home visits ‘at any time’ are conducted pursuant to a *court-imposed condition* of federal supervised release of which the supervisee is aware, and because a home visit is far less intrusive than a *probation search*, probation officers conducting a *home visit* are not subject to the reasonable suspicion standard applicable to *probation searches* under *Knights*.” *United States v. Reyes*, 283 F.3d 446, 462 (2d Cir.2002) (emphasis in original). The court reasoned that home visits as a condition of probation in the absence of reasonable suspicion were justified because of the need of the state to exercise supervision over probationers, ensuring that they comply with the conditions of probation and do not return to a life of crime. *Id.* at 461.

490 F.3d at 376.

In *United States v. Hedrick*, 146 Fed.Appx. 871, 872 (9th Cir. Aug. 25, 2005) (unpublished memorandum), the court also held that probation officers are not required to have reasonable suspicion to conduct authorized home visits. The court stated:

Hedrick did not have a reasonable expectation of privacy with respect to the home visit because (1) he was informed in his post-prison supervision agreement that probation officers would conduct home visits, *see United States v. Kincade*, 379 F.3d 813, 827-28 (9th Cir.2004) (en banc); (2) probationers enjoy only conditional liberty, *see Griffin v. Wisconsin*, 483 U.S. 868, 874, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), *United States v. Harper*, 928 F.2d 894, 896 & n. 1 (9th Cir.1991); (3) any such expectation of privacy is not one that society recognizes as reasonable, *see United States v. Knights*, 534 U.S. 112, 119-20, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001); and (4) one of the primary tasks of a probation officer is to determine the conditions and circumstances of the probationer's living arrangements and probationers are well aware of that verity. *See also Latta v. Fitzharris*, 521 F.2d 246, 249-50 (9th Cir.1975) (en banc); *United States v. Reyes*, 283 F.3d 446 (2d Cir.2002). Since the inception of the probation and parole systems, probationers and parolees have understood that they are subject to home visits from time to time by their probation and parole officers. Hedrick could not reasonably have had any other expectation. Thus, individualized suspicion was not required.

See also United States v. Tessier, 814 F.3d 432, 434 (6th Cir. 2016) (noting that courts uphold less invasive “home visits” where there is no reasonable suspicion).

The Nevada Interstate Probation Agreement and Rules that Defendant Buenrostro signed on January 21, 2015 did not contain an express provision that probation officers would conduct home visits at Mr. Buenrostro’s residence. The Arizona Uniform Conditions of Supervised

1 Probation that Defendant signed on October 29, 2014 stated, however, that Defendant would
2 provide the Arizona Probation Department with unrestricted access to his residence. The
3 application for Interstate Transfer that Defendant signed that same day stated that he would
4 comply with the terms and conditions of supervision that were placed on him by Arizona and
5 Nevada. Although it would have been preferable if the home visit condition had also been
6 expressly included in the Nevada Interstate Probation Agreement and Rules, Defendant was
7 reasonably notified that he was subject to home visits pursuant to the Arizona probation
8 conditions that he agreed to be bound by during his probation supervision in Nevada.

9 Officers Thompson and Wintersteen conducted several home visits and walk-through
10 inspections (“cursory searches”) during their supervision of Defendant. None of those
11 inspections or searches resulted in the discovery of evidence of probation violations or criminal
12 activity. On May 30, 2017, Officers MacDermaid and Hillyer conducted another home visit and
13 walk-through inspection of Mr. Buenrostro’s residence. At the time of that visit, Officer
14 MacDermaid was aware of the recent report from DEA Special Agent Mabey that Defendant was
15 still selling heroin. Officer MacDermaid was also aware that Defendant was on probation for a
16 felony conviction for possession of four pounds or more of marijuana. These circumstances
17 arguably provided the officers with reasonable suspicion to believe that Defendant was violating
18 his probation conditions or engaging in criminal activity. *Griffin v. Wisconsin, supra*. Thus,
19 even if the home visit/walk-through inspection was not authorized because it was not an express
20 condition of Defendant’s probation supervision in Nevada, it could be justified as a probation
21 search based on reasonable suspicion.

22 During the walk-through inspection, Officer MacDermaid observed a folded stack of one
23 hundred dollar bills in a dresser drawer that was partially opened, and a folded stack of twenty
24 dollar bills in a nightstand drawer that was “sticking out.” Defendant argues that the presence of
25 this currency was consistent with the cash payments he earned as an automobile mechanic. That
26 is a plausible explanation, but not one that Officer MacDermaid was required to believe.
27 Defendant acknowledged that he was not paying taxes on the money he earned as a mechanic.
28 There was no information as to how much mechanic work he actually performed or the amount

1 of income he earned from that work. The presence of large amounts of currency in a suspected
 2 narcotics trafficker's residence is consistent with suspected criminal activity. The fact that there
 3 are innocent explanations for particular circumstances does not require that the officers ignore
 4 the reasonable inferences that may be drawn from those circumstances. *See e.g. Illinois v.*
 5 *Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 676-77 (2000) (flight from the police may have
 6 innocent explanations, but it is an indication of criminal activity).

7 In *United States v. Williams*, 880 F.3d 713 (5th Cir. 2018), the defendant was on
 8 probation for a conviction for distributing marijuana. The defendant had been a model
 9 probationer, and the probation officer was preparing a request to terminate his probation when he
 10 received a tip from the DEA that defendant was trafficking large amounts of heroin. The
 11 probation officer went to the car dealership where defendant worked and observed large bulges
 12 underneath his clothing. The officer conducted a pat-down search which resulted in the
 13 discovery of large amounts of cash. The defendant stated that the money was the proceeds of car
 14 sales. The probation officers proceeded to search defendant's residence where substantial
 15 additional quantities of currency were found, as well as a firearm. In holding that the search of
 16 defendant's residence was supported by reasonable suspicion, the court stated:

17 The Supreme Court specifically acknowledged in *Griffin* that tips given to a
 18 probation officer from other law enforcement officers are sufficient to support
 19 reasonable suspicion to conduct a search of a probationer. *See 483 U.S. at 879–*
 20 *80, 107 S.Ct. 3164* (observing that it is “reasonable to permit information
 21 provided by a police officer, whether or not on the basis of firsthand
 22 knowledge, to support a probationer search”). Additionally, as the Court
 23 further observed in *Griffin*, in deciding whether to conduct a search of a
 24 probationer, the probation officer “must be able to proceed on the basis of its
 25 entire experience with the probationer, and to assess probabilities in the light of
 26 its knowledge of his life, character, and circumstances.” *Id. at 879, 107 S.Ct.*
 27 *3164*. Here, Officer Green provided a number of factors he considered based
 28 on his experience with Williams that would support reasonable suspicion to
 conduct a search once he received the tip from state and federal law
 enforcement. Specifically, Officer Green testified:

26 So in my mental checklist ... he's on [probation] for distributing drugs.
 27 DEA is telling me he's probably distributing drugs or that they think he
 28 is. But I'm still trying to give him the benefit of the doubt. He's got
 multiple previous convictions for distributing drugs. He lives in a
 fortress. I mean, his house is built like a fortress. You can't get in

1 without going through the [four large pit bulls] or somebody letting you
2 in. So I need to look into this. On face value, this is not looking good.

3 The tip, these factors, and Officer Green's past experience with Williams were
4 sufficient to support Officer Green's decision to conduct a search of
5 Williams's residence.

6 880 F.3d at 720.

7 In this case, the Nevada Parole and Probation Officers received information from DEA
8 Agent Mabey in July 2016 that Defendant Buenrostro was engaged in heroin smuggling or
9 trafficking, and was transporting heroin from Phoenix to Las Vegas. The officers were also
10 aware that the Defendant made authorized trips to Tucson, Arizona in March 2016, and later in
11 April/May 2017 which could correspond to Defendant's alleged narcotics trafficking. The
12 probation officers did not take action after Agent Mabey's initial tip in July 2016, but Officer
13 Wintersteen explained that he did not want to interrupt the DEA investigation.

14 Officer MacDermaid testified that the decision to search Defendant's residence was
15 based on (1) the information provided by DEA Agent Mabey; (2) the large amount of money
16 observed in Mr. Buenrostro's residence on May 30, 2017; (3) Mr. Buenrostro's inability to
17 demonstrate lawful employment; and (4) being behind on his supervision fees. Defendant argues
18 that the information that Agent Mabey received from the informant was unreliable. Under
19 *Griffin*, however, the probation officers were entitled to rely on Agent Mabey's tip without
20 inquiring into its underlying basis. Of course, if the probation officers knew that the information
21 on which the tip was based was unreliable, then it would not have been objectively reasonable
22 for them to rely on the tip.

23 Officer MacDermaid was aware from her conversation with Agent Mabey that a
24 confidential source provided the information that Mr. Buenrostro was smuggling heroin. There
25 is no evidence that she was familiar with the details of the DEA investigation or the reliability of
26 the confidential source. That said, the confidential source's tip appeared generally reliable. He
27 had provided reliable information in other investigations. He stated that he purchased drugs
28 from Jose a few years earlier, and had recently spoken to him about purchasing narcotics. The
confidential source positively identified a picture of Mr. Buenrostro as Jose. Defendant's

1 argument that the tip was stale, is overcome by the fact that the confidential source told Agent
 2 Mabey in early May 2017 that Defendant was continuing to sale heroin, and Agent Mabey
 3 reported that information to the probation officers.

4 CONCLUSION

5 The home visit/walk-through that Officers MacDermaid and Hillyer conducted on May
 6 30, 2017 did not violate the Fourth Amendment because it was authorized by Defendant's
 7 Arizona probation conditions which he was also bound by while under supervision in Nevada.
 8 Officer MacDermaid's observation of large amounts of currency in plain view in Defendant's
 9 bedroom, combined with the Agent Mabey's tips that Defendant was engaged in the smuggling
 10 of heroin, provided reasonable suspicion to support the probation search on June 20, 2017.
 11 Accordingly,

12 RECOMMENDATION

13 **IT IS HEREBY RECOMMENDED** that Defendant's Motion to Suppress Physical
 14 Evidence (ECF No. 45) be **denied**.

15 DATED this 14th day of June, 2019.

16 
 17 **GEORGE FOLEY, JR.**
 18 **UNITED STATES MAGISTRATE JUDGE**

19 NOTICE

20 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must
 21 be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court
 22 has held that the courts of appeal may determine that an appeal has been waived due to the
 23 failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985).
 24 This circuit has also held that (1) failure to file objections within the specified time and (2)
 25 failure to properly address and brief the objectionable issues waives the right to appeal the
 26 District Court's order and/or appeal factual issues from the order of the District Court. *Martinez*
 27 *v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452,
 28 454 (9th Cir. 1983).